

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

09-60847

CIV - DIMITROULEAS

KENNETH J. NOLAN
MARCELLA AUERBACH
NOLAN & AUERBACH, P.A. f/k/a
KENNETH J. NOLAN, P.A.

Civil Action No. **MAGISTRATE JUDGE
SNOW**

Plaintiffs,

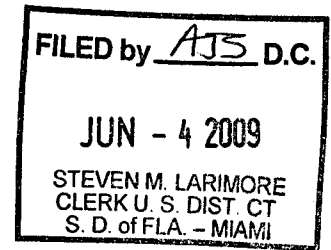
v.

UNITED STATES DEPARTMENT OF
HEALTH & HUMAN SERVICES

and

CENTERS FOR MEDICARE &
MEDICAID SERVICES

Defendants.



COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to enjoin the United States Department of Health & Human Services ("HHS" and the Centers for Medicare & Medicaid Services ("CMS")) from withholding agency records and to compel the production of records relating to the Medicaid Rebate Program administered by HHS and CMS improperly withheld from Plaintiffs.

2. The two FOIA Requests at issue, #C03F0I0788 (LCS), and #C07F0I0152 (RHR), have been pending for nearly six years and two and a half years respectively.

3. The average response time for “complex requests” for CMS is 297.6 days¹. The average response time for expedited processing is 239.3 days². Both of these FOIA requests have been pending much longer than the average and no documents have been produced in response to said requests.

JURISDICTION

4. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) because the Plaintiffs reside and do business in this district.

PARTIES

5. Plaintiff Kenneth J. Nolan, is a resident of Broward County, Florida and an attorney licensed in the State of Florida since 1986.

6. Plaintiff Marcella Auerbach, is a resident of Broward County, Florida and an attorney licensed in the State of Florida since 1978.

7. Plaintiff Nolan & Auerbach, P.A. is a law practice incorporated in the State of Florida with its principal place of business in the Southern District of Florida.

8. Defendant Department of Health & Human Services is an agency of the federal government of the United States and has possession of and control over the records Plaintiffs seek. HHS is an “agency” within the meaning of 5 U.S.C. §§ 551(1) and 701(b)(1).

9. Defendant CMS is an agency of the federal government of the United States and has possession of and control over the records Plaintiffs seek. CMS is an “agency” within the meaning of 5 U.S.C. §§ 551(1) and 701(b)(1).

¹ HHS Fiscal year 2008 Freedom of Information Annual Report VIII (A).

² *Id* An expedited response was submitted for FOIA request # C07F0I0152 (RHR).

STATEMENT OF FACTS - REQUEST # C03F0I0788 (LCS)

10. By letter dated August 26, 2003, plaintiff Kenneth J. Nolan and Nolan & Auerbach, P.A. f/k/a Kenneth J. Nolan, P.A. submitted a FOIA Request via telefax and US Mail to Freedom of Information Officer, CMS, Office of Freedom of Information, which requested certain documentation submitted by manufacturers of certain drug products in conjunction with their Rebate Agreements: "For each product listed below ... a copy of Appendix A to the Medicare Rebate Agreement (Form CMS-367), submitted by each manufacturer/labeler as described below..." On September 11, 2003, CMS responded to the receipt of the FOIA request and assigned #C03F0I0788 (LCS) to said request.

11. On January 20, 2004, plaintiff Kenneth J. Nolan had a telephone conversation with CMS, FOIA Section Officer Linda C. Sloan who advised that although CMS returned initially a "no document" response, the request was referred to another "operations division" of CMS for further inquiry.

12. On April 28, 2004, plaintiff Kenneth J. Nolan received a voicemail indicating that the FOIA request submitted was for pricing information and that information was "not allowed to be given out to anyone outside the government, and just calling to tell you that we cannot give you this kind of data."

13. On May 2004, plaintiff Kenneth J. Nolan had a conversation with CMS, Medicaid Rebate Program Operations (Technical Director) Vince Powell. Nolan informed Powell that he was interested in getting the requested information *without* the pricing information or without anything else that the government deemed confidential or privileged. Powell confirmed that the initial Medicaid Rebate Agreements were on paper and that the paper agreements, including the signature page, were in the possession of CMS. As to the quarterly information, Powell confirmed that CMS

had the quarterly information as follows: paper records "since 2000," diskette records for "four quarters" and electronic mailbox records, "just one quarter." Nolan reiterated his FOIA request for documents emphasizing the fact that he was interested in non-pricing, non privileged/non-confidential information.

14. On October 17, 2007, plaintiff Marcella Auerbach wrote a letter to CMS, FOIA Section inquiring at that time why compliance was taking so long, attaching the FOIA request, and summarizing several telephone conversations plaintiffs had with CMS including a message from CMS FOIA Section inquiring "whether we still wanted the FOIA requested filled."

STATEMENT OF FACTS - REQUEST # C07F0I0152 (RHR)

15. On October 11, 2006, plaintiffs Kenneth J. Nolan and Marcella Auerbach of Nolan and Auerbach, P.A. submitted a FOIA request via telefax and UPS overnight to Michael S. Marquis, Director, Freedom of Information Group, Centers for Medicare and Medicaid Services in Baltimore, Maryland requesting " ... Rebate Agreement (including the signature page and Appendix A... "between the Secretary of Health and Human Services for the manufacturers and/or labelers ... below..."

16. On April 12, 2007, CMS FOIA Section, responded to the receipt of the FOIA request and assigned number C07F0I0152 (RHR) to this separate request.

17. On November 6, 2007, via telefax and 2nd day air, plaintiff Marcella Auerbach wrote to CMS requesting an expedited response to the FOIA request.

CONCLUSION

18. Under 5 U.S.C. § 552(a)(6)(A)(i), Defendants had 20 working days to respond to Plaintiffs' August 26, 2003 and October 11, 2006 FOIA requests. More than 20 working days have

passed and Plaintiffs have not received a determination from Defendants concerning those requests, nor has Defendants produced any materials in response to Plaintiffs' requests.

19. Plaintiffs have conversed with and made approximately 37 telephone calls to CMS, FOIA Section, between January 20, 2003 and the present to no avail.

20. Plaintiffs therefore are deemed to have exhausted their administrative remedies under FOIA. *See* 5 U.S.C. § 552(a)(6)(C)(I).

21. Pursuant to the January 21, 2009 Freedom of Information Act Memorandum for the Heads of Executives, Department and Agencies published in the Federal Register Vol. 74, No.15 signed by President Barack Obama: "... All agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in the FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA."

22. Plaintiffs have a statutory right to the records they seek, and there is no legal basis for Defendants failure to disclose them to Plaintiffs.

CLAIMS FOR RELIEF

23. Plaintiffs have a statutory right under FOIA to the records they seek. Proper FOIA requests were sent to CMS- FOIA Section on August 26, 2003 and October 11, 2006.

24. Plaintiffs have followed up on both FOIA requests with CMS FOIA Section but have been met with delay after delay. Although there were at times hopeful exchanges, ultimately no information was ever produced.

25. The records clearly exist but the Government has refused to turn over the documents and will not issue a dispositive letter although requested to do so on numerous occasions. It is therefore improper for CMS to withhold and not disclose the records.

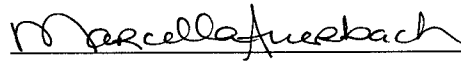
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that this Court:

- A) Declare that Defendants' failure to disclose the records requested by Plaintiffs is unlawful;
- B) Order Defendants' to make the requested records available to Plaintiffs without charge;
- C) Award Plaintiffs their costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E), as amended by the Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525; and
- D) Grant such other and further relief as this Court may deem just and proper.

Dated: June 3, 2009.

Respectfully submitted,



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NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

AMOUNT \$ 250.00 RECEIPT # 1702332 1702332

06/05/09